No. 14,349

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE R. CARR,

Appellant.

vs.

BEVERLY HILLS CORPORATION, a corporation, JOHN P. LORDAN, MAYNARD BRANDSMA, FRANCIS E. BROWN, ROBERT W. LANGLEY, HARRY F. DIETRICH, and ROSS J. FERRAR,

Appellees.

PETITION FOR REHEARING AND IN THE ALTERNATIVE FOR STAY OF MANDATE.

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FILED
JUL 2) 1956
PAUL P. O'BRIEN, CLER

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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PETITION FOR REHEARING AND IN THE ALTERNATIVE FOR STAY OF MANDATE.

To the Honorable, the United States Court of Appeals for the Ninth Circuit and to the Honorable Albert Lee Stephens, James Alger Fee and Richard H. Chambers, Judges Thereof:

Comes now George R. Carr, appellant in the above-entitled cause, and presents this, his Petition for Rehearing of the above-entitled appeal and, in the alternative, for Stay of Mandate for a reasonable time enabling him to file his Petition for Writ of Certiorari in the Supreme Court of the United States.

In support of his Petition for Rehearing appellant respectfully shows:

That the opinion of this Honorable Court in this case is erroneous and contrary to law in the following particulars:

I.

The Court erred in holding that the District Court did not err in finding that at the time of the commencement of the action there was no domination of the defendant corporation resulting in the destruction of its independent volition.

II.

The Court erred in holding that the defendant corporation must be realigned as a plaintiff simply because of a finding that the corporation was not under the domination of the individual defendants or under the control of persons who were antagonistic or hostile to the financial interests of the corporation, and therefore was not incapacitated from protecting its own financial interests.

I.

The Court Erred in Holding That the District Court Did Not Err in Finding That at the Time of the Commencement of the Action There Was No Domination of the Defendant Corporation Resulting in the Destruction of Its Independent Volition.

It is axiomatic that a corporation can exercise its volition only through its board of directors; that the volition of its directors, acting as a board of directors, is the will of the corporation.

Appellant pointed out, in his opening brief (pp. 5-8, 32-33), the extent and manner in which the individual defendants had mismanaged the affairs of the corporation, to their personal gain, at the time of the wrongs complained of, and how they had selected their own successors to endorse their misdeeds (as endorse them they did) only after the plaintiff had, for four long months, insisted and urged that they recognize, respect, and discharge their obligations of trust.

The appellant respectfully submits that the best test, and the only *real* test, of whether there is such a domination of the corporation that its independent volition is destroyed is whether the corporation does, in fact, exercise an independent volition. In other words, the best test of whether a corporation *can* protect its own financial interests is whether or not it *does* protect them.

In the case at bar, the District Court's findings, cited by this Honorable Court, include the statement that it "would have been futile" for the plaintiff to make a formal "demand" upon the corporation.

Appellant respectfully submits that the facts of this case, when put to this realistic test, permit of no conclusion other than that the corporation was, at the time of the commencement of this action, dominated by persons antagonistic of the financial interests of the corporation.

II.

The Court Erred in Holding That the Defendant Corporation Must Be Realigned as a Plaintiff Simply Because of a Finding That the Corporation Was Not Under the Domination of the Individual Defendants or Under the Control of Persons Who Were Antagonistic or Hostile to the Financial Interests of the Corporation, and Therefore Was Not Incapacitated From Protecting Its Own Financial Interests.

In its opinion this Honorable Court cites and follows its opinion in *Smith v. Sperling* (9 Cir., No. 14,334, filed May 21, 1956), and *Smith v. Sperling,* 117 Fed. Supp. 781. The purport of the opinion seems to be that unless the management of corporation is dominated by the wrongdoers themselves, or by persons who are antagonistic to the financial interests of the corporation, then the corporation is not "incapacitated" from protecting its own financial interests and it must be aligned as a plaintiff.

Appellant respectfully submits that this entire formula is premised on error and that it is contrary to the established precedents.

In the first place it appears to assume that a corporation can have a "capacity" to act in all except those cases in which there is substantial identity between its management and the alleged wrongdoers in the acts complained of. The Appellant submits that this is fallacious because the true test should be, "What action *is* the corporation

taking?" not "What action *could* the corporation take?" The stockholder, in protecting his interests as such, is not to be concerned with what management *can* do, if it is so inclined, he is to be concerned with that which management actually *does* do. This, we submit, is the only realistic, and valid, test.

Secondly, the formula which has been followed in the *Smith v. Sperling* decision requires, as its principal and essential ingredient, a generous amount of "antagonism" and "hostility," between management and the financial interests of the corporation, so much so, in fact, that the corporation is "incapacitated" from protecting its financial interests.

The appellant strongly urges this Court to reconsider this branch of its opinion for the reason that, as appellant understands the authorities, this theory is directly contrary to law and precedent.

It is appellant's position that such "hostility" or "antagonism," in the ordinarily-understood meaning of those words, is not necessary in order to align the corporation as a defendant in this type of case. As the Supreme Court said, in *Delaware & Hudson Co. v. Albany & Susquehanna R.R. Co.* (1909), 213 U. S. 435:

> "* * * The attitude of the directors need not be sinister. It may be sincere. * * *"

See also:

Ashwander et al. v. Tennessee Valley Authority, et al. (1935), 297 U. S. 288, 56 S. Ct. 466, 80 L. Ed. 688;

Schmidt v. Esquire, Inc. (1954), 210 F. 2d 908, 911;

Groel v. United Electric Co. (1904), 132 Fed. 252, 263.

Conclusion.

It is respectfully submitted that the decision of this Court is erroneous in the several particulars heretofore set forth, to the detriment and prejudice of the appellant and all others similarly situated, and that appellant is justly entitled to a reconsideration and to a rehearing in order that he may fully and completely present the errors complained of.

Petition for Stay of Mandate.

In the event this Court should deny the above Petition for Rehearing appellant respectfully requests the Court to make its order staying mandate in this cause for a reasonable time in order to enable appellant to file his Petition for Writ of Certiorari in the Supreme Court of the United States.

Respectfully submitted,

George E. Danielson,
Attorney for Appellant.

Thomas Dodd Healy,
Of Counsel.

Certificate of Counsel.

I, George E. Danielson, counsel for the above-named appellant, do hereby certify that in my judgment the foregoing Petition for Rehearing is well founded, fully justified, and that it is not interposed for delay.

GEORGE E. DANIELSON,
Attorney for Appellant.

THOMAS DODD HEALY,
Of Counsel.